

# PENUMBRAL ACADEMIC FREEDOM: INTERPRETING THE TENURE CONTRACT IN A TIME OF CONSTITUTIONAL IMPOTENCE

RICHARD J. PELTZ\*

INTRODUCTION .....	159
A. The False Promise of Tenure? .....	160
B. The Problem with Academic Freedom, and a Proposal .....	162
I. THE THREAT TO ACADEMIC FREEDOM .....	163
II. INTERPRETING THE TENURE CONTRACT TO DESCRIBE PENUMBRAL ACADEMIC FREEDOM.....	174
A. Academic Freedom and the 1940 AAUP Statement of Principles .....	174
B. The “Proposed Interpretation Concerning Closely Related Activities” .....	177
III. CONCLUSION .....	184

## INTRODUCTION

This article recounts the deficiencies of constitutional law and common tenure-contract language—the latter based on the 1940 Statement of Principles of the American Association of University Professors<sup>1</sup>—in protecting the academic freedom of faculty on the modern university campus. The article proposes an Interpretation of that common language, accompanied by Illustrations, aiming to describe the penumbras of academic freedom—faculty rights and responsibilities that surround and emanate from the three traditional pillars of teaching, research, and service—that are within the scope of the tenure contract but not explicitly described by it, and therefore too readily subject to neglectful interpretation. This proposal means thus to provide more comprehensive protection for academic freedom at a time when the constitutional concept is near defunct, and thus more broadly to realize, through proper

---

\* Richard J. Peltz, J.D., is a professor of law. This work was completed with the assistance of a grant from the University of Arkansas at Little Rock, William H. Bowen Law School.

1. 1940 Statement of Principles on Academic Freedom and Tenure, *in* AAUP POLICY DOCUMENTS & REPORTS 3 (10th ed. 2006).

understanding of the written tenure contract, the ideal of the university as the quintessential marketplace of ideas.

#### A. The False Promise of Tenure?

For what could you, the tenured professor, be fired? What line are you not permitted to cross?

In the spring of 2007, I was told by my law school<sup>2</sup> that I would be fired if I did not drop my private civil action for defamation against local attorneys and recent alumnae.<sup>3</sup> The lawsuit grew out of accusations of racism (and underlying false factual assertions) against me after I took the “anti” position in a campus debate on affirmative action, at the invitation of the Black Law Students Association.<sup>4</sup> It would be fine, the dean explained, for a professor to sue a former student in a case of physical injury. But the university would not abide a tort suit predicated on reputational harm.<sup>5</sup>

I suspect the university’s demand had more to do with public relations than the merits of my cause. Such is our society’s view of litigation<sup>6</sup> that rarely does anyone, party or not, look good in connection with a lawsuit, and neither I nor the university looked good.<sup>7</sup> I had sued only as a last resort, after the university rebuffed my repeated entreaties for internal redress.<sup>8</sup> I deliberately had declined to pursue a cause of action against the

2. Personal meeting with Charles W. Goldner, Jr., Dean, William H. Bowen School of Law, University of Arkansas at Little Rock, Little Rock, Ark., June 17, 2008.

3. Second Am. Compl., *Peltz v. Nation*, No. CV 2008-2530 (Pulaski County Cir. Ct. filed June 10, 2008).

4. *Id.* ¶¶ 14–15, 19, 21–27, 35–36 & ex. 3. In the social-science parlance, which borrows a term from ornithology, I was “mobbed.” Also called workplace bullying, this phenomenon has been studied extensively, particularly in the academic context, by Professor Kenneth Westheus, who maintains an unparalleled web site rounding up the research. See Kenneth Westheus, *Workplace Mobbing in Academe*, <http://kwesthues.com/mobbing.htm> (last visited Oct. 14, 2009). See generally, e.g., KENNETH WESTHEUS, *THE ENVY OF EXCELLENCE: ADMINISTRATIVE MOBING OF HIGH-ACHIEVING PROFESSORS* (2006); John Gravois, *Mob Rule*, *CHRON. OF HIGHER EDUC.*, Apr. 14, 2006, at A10. My lawsuit was an instance of the “boomerang” effect, which in the vocabulary of mobbing describes the mob target who fights back. See Brian Martin, *The Richardson Dismissal as an Academic Boomerang*, in KENNETH WESTHEUS, ED., *WORKPLACE MOBING IN ACADEME: REPORTS FROM TWENTY UNIVERSITIES* 317 (2004).

5. Personal meeting with Goldner, *supra* note 2.

6. See generally, e.g., WILLIAM HALTOM & MICHAEL McCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* (2004).

7. See, e.g., Editorial, *End this Farce: The Law School Follies of '08*, *ARK. DEMOCRAT-GAZETTE*, Mar. 19, 2008, at A18 (criticizing both parties in case). Perhaps as one ought to expect, news coverage tended to play up the conflict as “professor sues students,” à la “man bites dog,” with sparse explanation of the facts. See, e.g., Lynnley Browning, *Law Professor Accuses 2 Students of Defamation*, *N.Y. TIMES*, May 1, 2008, at A21. *The New York Times* furthermore never reported the resolution of the matter.

8. In retrospect, the university’s refusal to negotiate before I instituted a lawsuit was likely the product of precisely the calculation posited in the mobbing literature, see

university so as to minimize the impact of the case on the school, on my students (many of whom were defiantly loyal, as it turned out), and on my colleagues (who were not, with a few commendable exceptions). But for all my caution, the university to which I had been loyal for a decade leapt into the fray anyway, apparently without regard for my freedom of petition, or for my legal interest in tenure.

The non-party university, almost all of the defendants, and I reached a settlement shortly after the threat to my employment.<sup>9</sup> I am grateful to the cooler heads within the bureaucracy who facilitated that outcome. The university at last provided me with a letter stating that despite charges leveled inside and outside the school, I had done nothing wrong.<sup>10</sup> I dismissed the lawsuit,<sup>11</sup> and I continue to be a productive member of a largely chilly faculty.

But now I am left to wonder what freedom I have. I doubt every action, every word. I have steered clear of overtly political issues in my extensive work on behalf of state legislators. I have resigned my memberships in both the ACLU and the Federalist Society. I skipped a lecture by Charles Murray when he visited a nearby historically black college. Murray is co-author of the controversial *Bell Curve*,<sup>12</sup> and more recently author of *Real Education*,<sup>13</sup> which challenges the conventional wisdom of four-year college for everyone, among other sacred cows. I was afraid that my presence at his talk would have been perceived as an endorsement of his positions on affirmative action, or on education, or on anything that might precipitate another round of attacks on my reputation and career.

The chilling effect is worse in my capacity as an educator. Though having served in the past as adviser of the student Federalist Society and ACLU chapters, I have more recently refused to be a faculty sponsor. I

---

*supra* note 4, by which administrators have more to lose siding with a mob target than by siding with the mob. See Presentation, Joan E. Friedenberg, Mark A. Schneider, & Kenneth Westheus, *Mobbing as a Factor in Faculty Work Life*, American Association of University Professors International Conference, Washington, D.C., June 13, 2009, overview available at <http://kwesthues.com/mobbing.htm> (last visited Oct. 14, 2009). See generally Joan Friedenberg, *The Anatomy of an Academic Mobbing*, in KENNETH WESTHEUS, ED., *THE ANATOMY OF AN ACADEMIC MOBBIING: TWO CASES* (2008).

9. See Scott Jaschik, *What You Can't Win in Court*, INSIDER HIGHER ED, Nov. 17, 2008, <http://www.insidehighered.com/news/2008/11/17/ualr> (last accessed Apr. 28, 2009); Debra Cassens Weiss, *Law Prof Drops Defamation Suit against Students over Racism Claims*, ABA J., [http://www.abajournal.com/news/-law\\_prof\\_drops\\_defamation\\_suit\\_against\\_students\\_over\\_racism\\_claims/](http://www.abajournal.com/news/-law_prof_drops_defamation_suit_against_students_over_racism_claims/) (last accessed Apr. 28, 2009).

10. Letter from John M.A. DiPippa, Interim Dean, William H. Bowen School of Law, University of Arkansas at Little Rock, to author, Oct. 2, 2008, at 1–2 (copy on file with author).

11. Orders, *Peltz*, No. CV 2008-2530 (signed Oct. 22, 2008).

12. RICHARD J. HERNSTEIN & CHARLES MURRAY, *BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1996).

13. CHARLES MURRAY, *REAL EDUCATION: FOUR SIMPLE TRUTHS FOR BRINGING AMERICA'S SCHOOLS BACK TO REALITY* (2008).

have declined to participate on panels organized by students on current issues and events in politics. I worry about class discussions on issues such as hate speech and race discrimination, for fear that someone will perceive a slight and claim a civil-rights violation. I close doors and speak to students in hushed tones when they seek advice on matters that might displease the university, such as *U.S. News* rankings, or transfer to another law school that might better suit their needs. I refuse to intervene when they are wronged by the same sort of allegations that were wrongfully leveled against me. I write *this text* only with trepidation.

And I am not alone. The lesson of my experience was not lost on untenured, junior faculty at my school, who turned my name into a verb. Behind closed doors, to be “Peltzed” is to have complaints of political incorrectness made against you, and then to have school administrators and colleagues gang up with your accusers and join in the pummeling.<sup>14</sup> If Peltz—a tenured, productive full professor, and winner of excellence awards in teaching, research, and service—could be *fired* for First Amendment-protected activity outside the law school, what hope is there for the tenure prospect? At least one of the political-issue panels that I refused to join never materialized because none of the junior faculty was willing to risk it.

It’s not easy to be an effective educator when your employer does not have your back.

I was taught, some time ago, that the university is the quintessential marketplace of ideas.<sup>15</sup> I am no longer certain that that was ever true. What I do know now is that if that maxim is desirable even as an ideal, the current legal framework for academic freedom is insufficient to get us there. The purpose of this article is to start changing that.

#### B. The Problem with Academic Freedom, and a Proposal

If the university is the quintessential marketplace of ideas, then academic freedom is the legal and theoretical guarantee that keeps the marketplace open for business.<sup>16</sup> Accordingly, “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”<sup>17</sup>

Nevertheless, recent legal developments have cast serious doubt on whether academic freedom has a constitutional dimension. The (so-called) judicial activism of the civil-rights era having abated, the courts have been busy about the business of mapping and marking the boundaries of an

---

14. Transcript of Meeting of Faculty, William H. Bowen School of Law, University of Arkansas at Little Rock, Little Rock, Ark., Feb. 5, 2009 (copy on file with author).

15. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

16. *See, e.g., id.*

17. *Id.*

expanded, but finite, First Amendment freedom of expression. Amid this impotence, or omission of constitutional potential (pressed substantially from the right), coincident with a vigorous effort to enforce an official orthodoxy in U.S. higher education (inversely and ironically, pressed substantially from the left), the limits and inadequacies of the academic tenure contract are being exposed. Thus bereft of constitutional, contractual, and philosophical underpinning, academic freedom is unraveling.

This article posits one approach, a start, to rescue and restore the protection afforded academic freedom in the tenure contract by positing a free-expression-friendly interpretation of its terms. Using the 1940 AAUP Statement of Principles,<sup>18</sup> which provides the language from which university tenure contracts are overwhelmingly drawn, this article proposes an Interpretation, and accompanying Illustrations, to encourage, if not require, administrative and judicial construction of the contractual language in a manner that modernizes the tenure contract to afford adequate protection for academic freedom. Where the tenure contract drawn on AAUP principles focuses on the core professorial functions of teaching, research, and service, the Interpretation aims to describe the penumbras—disconcertingly wide spaces that lie between these three core pillars—in which can be found myriad responsibilities that faculty actually fulfill. Notable among these penumbral responsibilities is the function of faculty governance, to which freedom of expression and inquiry is essential.

### I. THE THREAT TO ACADEMIC FREEDOM

Academic freedom traces its roots in Supreme Court case law to the McCarthyist investigation and loyalty-oath cases involving academics—namely, *Sweezy v. New Hampshire* and *Keyishian v. Board of Regents*.<sup>19</sup> Both generated generous dicta on the essentiality of academic freedom to the First Amendment ideals of freedom of expression, thought, and conscience, but neither case was decided on grounds of academic freedom specifically. The concept subsequently escaped articulation in the civil-rights era as any sort of rule. The eloquent dicta of those cases has been quoted many times in Court decisions in the decades since—notably in *University of Pennsylvania v. EEOC* and *Grutter v. Bollinger*<sup>20</sup>—but academic freedom has continued to haunt opinions as dicta only, never taking the more corporeal form of doctrine.

---

18. 1940 Statement of Principles on Academic Freedom and Tenure, *supra* note 1, at 3.

19. *Keyishian*, 385 U.S. 589; *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

20. *Grutter v. Bollinger*, 539 U.S. 306, 324, 329 (2003) (relying in part upon academic freedom to support compelling university interest in diverse student body achieved through affirmative action); *University of Pa. v. EEOC*, 493 U.S. 182, 195–202 (1990) (declining to articulate First Amendment right upon “so-called academic-freedom cases” vis-à-vis imposition on university of EEOC subpoena).

Despite the apparently continuing confidence of a Court majority that the First Amendment animates some sort of academic-freedom right, courts and scholars have lately doubted whether academic freedom in fact carves out any discrete zone of liberty protected in constitutional law.<sup>21</sup> At a 2007 panel of the annual conference of the Association of American Law Schools,<sup>22</sup> Professor Van Alstyne, a renowned constitutional scholar, described three threads of High Court First Amendment case law that cast serious doubt on the future viability of academic freedom as a constitutional concept.<sup>23</sup> First, the U.S. Supreme Court's jurisprudence on employee speech suggests that a public employee acting within the scope of employment enjoys no First Amendment protection vis-à-vis the government employer.<sup>24</sup> Second, the Court's jurisprudence in government funding suggests that a recipient of government funds may be constrained to speak only in accordance with the terms of the funding.<sup>25</sup> Third, the Court's jurisprudence in government speech suggests that public institutions themselves enjoy a prerogative to speak their own institutional viewpoints,<sup>26</sup> and some courts have elevated First Amendment protection for institutions over the liberty of individuals within institutions.<sup>27</sup>

Leading the charge in these veins of doubt is the Court doctrine in public-employee speech.<sup>28</sup> No First Amendment case has kindled more

---

21. See generally, e.g., R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793 (2007).

22. Academic Freedom, Plenary Program, AALS, Washington, D.C., Jan. 4, 2007; see Elia Powers, *A Freewheeling Academic Freedom Debate*, INSIDE HIGHER ED, Jan. 5, 2007.

23. William W. Van Alstyne, Academic Freedom, Plenary Program, AALS, Washington, D.C., Jan. 4, 2007.

24. *Id.* (discussing *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)). The *Garcetti* Court expressly reserved the question of employee-speech doctrine in the academic context. *Garcetti*, 126 S. Ct. at 1962; see also *id.* at 1963, 1969–70 (Souter, J., dissenting).

25. Van Alstyne, *supra* note 23 (discussing *Rust v. Sullivan*, 500 U.S. 173 (1991)).

26. *Id.* (discussing *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005)).

27. E.g., *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000). See generally Richard Fossey & Joseph C. Beckham, Commentary, *University Authority Over Teaching Activities: Institutional Regulation May Override a Faculty Member's Academic Freedom*, 228 ED. L. REV. 1, 21–22 (2008) (finding academic freedom an institutional and not individual faculty prerogative in context of classroom instruction); Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLINE L. REV. 1 (2007).

28. As the most important doctrine of the three, only the employee-speech doctrine is discussed here in greater depth. All of these doctrines present essentially the same problem, viewed through different prisms: when does the role of Government transform from that of regulator, subject to the full strictures of the First Amendment, to that of competing actor in the private marketplace of ideas—as employer, benefactor, or speaker—precluding full-throttle application of the First Amendment? The threshold test of the employee-speech doctrine, discussed *infra*, is but one way to ask the question. It is no wonder that these are difficult cases, resulting in five-to-four

debate over academic freedom in recent memory than a case in this area, *Garcetti v. Ceballos*.<sup>29</sup> *Garcetti* joined the classic trio of cases used to teach employee-speech doctrine for now more than twenty years: *Pickering v. Board of Education*, *Connick v. Myers*, and *Rankin v. McPherson*.<sup>30</sup> The *Pickering* test asks as a threshold matter “whether the employee spoke as a citizen on a matter of public concern.”<sup>31</sup> If the answer is no, then the First Amendment is generally not implicated.<sup>32</sup> The Government acts much as a private employer, and not in its capacity as regulator; procedural due process may apply, but not its substantive counterpart.<sup>33</sup> If the answer is yes, then the First Amendment is implicated, and the test of the merits is the *Pickering* balancing test.<sup>34</sup> This test balances “the interests of the [employee], as a citizen, in commenting upon matters of public concern[, against] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>35</sup>

The role of the speaker as citizen or employee, and the matter as one of public or private concern, is as often as not in the eye of the beholder.<sup>36</sup> A fundamental problem that has always lurked behind application of *Pickering* arises in the threshold test. The tension was evident in *Garcetti*,

---

decisions in cases such as *Rankin v. McPherson*, 483 U.S. 378 (1987), and *Connick v. Myers*, 461 U.S. 138 (1983) (reaching opposite conclusions in government-as-employer cases); *Legal Services Corp. v. Velasquez*, 531 U.S. 533, and *Rust v. Sullivan*, 500 U.S. 173 (1991) (reaching opposite conclusions in government-as-benefactor cases); and six-to-three and five-to-four decisions respectively in *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997), and *United States v. United Foods*, 533 U.S. 405 (2001) (reaching opposite conclusions in government-as-speaker cases).

29. 547 U.S. 410 (2006); see, e.g., Susan P. Stuart, *Citizen Teacher: Damned if You Do, Damned if You Don't*, 76 U. CIN. L. REV. 1281, 1281–82 (2008) (observing that “*Garcetti v. Ceballos* is becoming one of the most-used cases in its mere two-year history,” and that “bad management practices now seem to trump the First Amendment. Such practices have school boards discharging teachers and administrators for speaking out—truthfully—on matters of fiscal mismanagement, student discipline, and similar school district problems,” and describing *Garcetti* as “perhaps one of the most extraordinarily ill-considered—and short-sighted—opinions penned by the United States Supreme Court in recent years”).

30. *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

31. *Garcetti*, 547 U.S. at 418 (citing *Pickering*, 391 U.S. at 568).

32. E.g., *id.* (citing *Connick*, 461 U.S. at 147). Whether there is any modest role remaining for the First Amendment when the government acts as employer is disputed. Dissenting in *Garcetti*, Justice Stevens wrote that the answer is “[s]ometimes,” not “never,” and suggested that the Government’s position should not be justified when the speech is “unwelcome [merely] because it reveals facts that the supervisor would rather not have anyone else discover[.]” *Id.* at 426 (Stevens, J., dissenting) (citing whistleblower cases in the circuits).

33. E.g., *id.*

34. E.g., *id.* (citing *Pickering*, 391 U.S. at 568).

35. *Connick v. Myers*, 461 U.S. 138, 140 (1983) and *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968), quoted in *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

36. Cf. *supra* note 26 and accompanying text.

*Rankin*, and *Connick*, all five-to-four decisions, with the “public concern” question at issue every time.<sup>37</sup> *Connick*, for example, was a case about an assistant district attorney’s controversial questionnaire about office politics and politics in the office. ADA Myers prevailed on the “public concern” inquiry as to some, but not many, of the items on her questionnaire; she would have had to win all of her points to invalidate the employment action, a transfer, to which she objected. Justice Brennan complained in dissent that as a matter of “hornbook law,” “speech about ‘the manner in which government is operated’ is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment.”<sup>38</sup> The Court, in contrast, seemed persuaded by the Government’s case because ADA Myers’ “questionnaire emerged after a persistent dispute between [her and her boss] over office transfer policy.”<sup>39</sup> The threshold test thus formulated does not seem to admit of employee expression that might simultaneously further the public interest *and* the speaker’s own employment interests.

The classic conundrum arises in the case of a whistleblower. Even Justice Brennan in *Connick* reasoned that the questionnaire “did not adversely affect the operations of the District Attorney’s Office or interfere with Myers’ working relationship with her fellow employees[.]”<sup>40</sup> In the case of the whistleblower—giving the speaker the benefit of the doubt—the expression is a matter of public concern, but might well interfere with working relationships. Indeed, the termination of a malfeasant co-worker may be a whistleblower’s very purpose. Thus Justice Stevens, dissenting in *Garcetti*, contended that government-as-employer is sometimes, but not always, dispositive of First Amendment application, and he cited a number of circuit-court whistleblower cases.<sup>41</sup> In *Garcetti*, deputy district attorney Ceballos suffered adverse employment action after he alleged government misconduct in a case. Because he spoke out on a matter within his purview as a public official, the Court classified him as employee-speaker rather than citizen-speaker, and therefore the Government as employer rather than regulator. The position of the *Garcetti* majority was plain: whistleblowers should seek protection in the legislatures.<sup>42</sup>

The problem of *Pickering*—especially after *Garcetti* restated the

---

37. *E.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 427 (Stevens, J., dissenting) (rejecting a “categorical difference between speaking as a citizen and speaking in the course of one’s employment); *Rankin*, 483 U.S. at 394 (Scalia, J., dissenting) (accusing majority of “irrationally expand[ing] the definition of ‘public concern’”); *Connick*, 461 U.S. at 156 (Brennan, J., dissenting).

38. *Connick*, 461 U.S. at 156 (Brennan, J., dissenting).

39. *Id.* at 154.

40. *Id.* at 156 (Brennan, J., dissenting).

41. *Garcetti*, 547 U.S. at 426 & n.\*.

42. *Id.* at 425–26.



threshold test as one of “official duties” in a whistleblower context<sup>43</sup>—is especially problematic for academics. What sets the academic at a public college or university apart from other public officials is that the academic’s job *is* free expression: expression in teaching, in research, and in the course of public service. The ideal of academic freedom, whether or not a legal concept, means to afford the academic independence from the employer in the conduct of this expression. In teaching, the independence of the classroom instructor from any “pall of orthodoxy” has been a recurring theme in Supreme Court dicta.<sup>44</sup> In research, credibility and reliability depend on independence—for example, favorably distinguishing the drug research of an academic institution from that of a profit-driven pharmaceutical maker. And in service, the independence of the academic is what makes him or her the impassive source to whom legislative committees, news media, and research organizations turn for expert opinions.<sup>45</sup>

In all of these tasks, the academic is performing “official duties.” The *Pickering-Garcetti* line of cases seems thus to strip academics of any constitutional protection, unless academic freedom is—as the Supreme Court has never held that it is or is not—an independent constitutional concept. Justice Kennedy, writing for the Court in *Garcetti*, and responding to the dissent of Justice Souter,<sup>46</sup> cautioned:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case

---

43. What I characterize here as a restatement is often, and arguably better, rendered as the creation of a second threshold test, such that the original *Pickering* threshold tests for “public concern,” and the *Garcetti* threshold tests for “official duties.” The employee may invoke the First Amendment only upon a matter of public concern that also is not within the scope of official duties. *E.g.*, *Davis v McKinney*, 518 F.3d 304, 311–12 (5th Cir. 2008) (“*Garcetti* added a threshold layer to our previous analysis.”), *quoted in* Paul M. Secunda, *Garcetti’s Impact on the First Amendment Speech Rights of Federal Employees*, 7 *FIRST AMEND. L. REV.* 117, 125 n.35 (2008).

44. *Keyishian*, 385 U.S. at 603, *quoted in, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 438 (Stevens, J., dissenting).

45. *E.g.*, Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty After Garcetti*, 33 *J.C. & U.L.* 313, 314 (2007) (explaining how higher education faculty “are unique”: “Unlike primary and secondary teachers, whose principal duty is intra-institutional knowledge dissemination, major public college and university faculty members’ primary duty is the creation and *public*, i.e., *extra*-institutional, dissemination of knowledge.” (emphasis in original)).

46. *Id.* at 439 (Souter, J., dissenting).

involving speech related to scholarship or teaching.<sup>47</sup>

Meanwhile, absent a ruling on point, academics are left to look elsewhere to build a foundation for academic freedom. Like whistleblowers, they must turn to protections of statute—largely non-existent in the academic-freedom area—or of the employment contract.

A recent *First Amendment Law Review* symposium<sup>48</sup> focused on *Garcetti*, and two authors wrote specifically on the implications for academic freedom.<sup>49</sup> Robert M. O’Neil, founding director of the Thomas Jefferson Center for Freedom of Expression and president emeritus of the University of Virginia, described the case of Juan Hong, a tenured University of California-Irvine professor who claimed in a lawsuit that he

47. *Id.* at 425.

48. Symposium: Public Citizens, Public Servants: Free Speech in the Post-*Garcetti* Workplace, 7 *FIRST AMEND. L. REV.* 1 (2008); see also Symposium on Academic Freedom, 33 *J.C. & U.L.* 245 (2007); Symposium: Horowitz, Churchill, Columbia—What Next for Academic Freedom?, 77 *U. Colo. L. Rev.* 841 (2006); Robert C. Cloud, *Public Employee Speech on Matters Pursuant to their Official Duties: Whistle While You Work?*, 210 *ED. L. REP.* 855, 866 (2006) (cautioning courts against application of *Garcetti* in the academic sphere); Martha McCarthy, Commentary, *Garcetti v. Ceballos: Another Hurdle for Public Employees*, 210 *ED. L. REP.* 867, 877–83 (2006) (analyzing *Garcetti* and concluding that case, perhaps unwisely, weights *Pickering* threshold inquiry against whistleblowers); Leonard M. Niehoff, *Peculiar Marketplace: Applying Garcetti v. Ceballos in the Public Higher Education Context*, 35 *J.C. & U.L.* 75, 76, 97 (2008) (analyzing public higher education cases since *Garcetti* to conclude that decision has limited First Amendment employee speech and “perhaps” faculty academic freedom). A thorough overview of academic freedom and the employee-speech doctrine, ultimately conceiving of academic freedom as a qualified immunity rather than a constitutional right, can be found in Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 *J.C. & U.L.* 111 (2007). See also Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 *U. COLO. L. REV.* 955, 957, 968–83 (2006) (calling for development of academic freedom doctrine relative to “germaneness to the university’s central academic mission”); Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty After Garcetti*, 33 *J.C. & U.L.* 313, 315, 359–60 (2007) (reviewing history of academic freedom and concluding that lack of coherent academic freedom doctrine in constitutional law threatens “society’s economic and cultural vitality”); R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 *NEB. L. REV.* 793, 826–27 (2007) (exploring origin of academic freedom and finding current free speech tests inadequate to protect it). See generally Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 *U. COLO. L. REV.* 907 (2006). Some writers have proposed associational rights as a foundation upon which to articulate First Amendment academic freedom. E.g., Barbara K. Bucholtz, *What Goes Around, Comes Around: Legal Ironies in an Emergent Doctrine for Preserving Academic Freedom and the University Mission*, 13 *TEX. WESLEYAN L. REV.* 311, 326–31 (2007); Emily Calhoun, *Academic Freedom: Disciplinary Lessons from Hogwarts*, 77 *U. COLO. L. REV.* 843, 871–80 (2006).

49. Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 *FIRST AMEND. L. REV.* 54 (2008); Robert M. O’Neil, *Academic Speech in the Post-Garcetti Environment*, 7 *FIRST AMEND. L. REV.* 1 (2008).

was denied a routine merit pay increase because of “his outspoken criticism of the way in which several recent hiring and promotion decisions in his department had been handled, and his publicly expressed objection to excessive reliance on lecturers (rather than full-time faculty) to teach undergraduates in his discipline.”<sup>50</sup> The district court concluded that Hong spoke “pursuant to his official duties,” and therefore not on “matters of public concern,” so the First Amendment did not apply.<sup>51</sup>

According to O’Neil, courts in six circuits before *Garcetti* had consistently rejected the either-or dichotomy of employee-speaker and citizen-speaker.<sup>52</sup> O’Neil discussed the Fourth Circuit case of a police officer who criticized official policy;<sup>53</sup> the court of appeals opined, “[M]atters relating to your employment clearly can encompass matters of public concern.”<sup>54</sup> But the courts of appeals in five circuits since *Garcetti* have turned around dramatically, O’Neil documented, broadening the scope of “official duties”—in the Tenth Circuit, for example, to “activities [a public employee is] paid to do.”<sup>55</sup> Insofar as this “extension of *Garcetti*” applies to university professors, as in Hong’s case, O’Neil lamented:

If the only conditions under which complete candor may be expected of scholarly witnesses are those about which a professor is largely ignorant, we will have come to a sorry state indeed. Thus an extension of *Garcetti* to university professors would not only disserve the core values of academic freedom, but would also dramatically disserve the public interest.<sup>56</sup>

Professor Sheldon Nahmod contributed the second article focused on academic freedom to the *First Amendment Law Review* symposium on *Garcetti*.<sup>57</sup> Taking a self-described “normative approach,” Nahmod demonstrated that academic freedom is consistent “with the democracy-promoting purposes of higher education: the ability to engage in moral reasoning or, more broadly, the development of critical intellectual faculties and the advancement of knowledge.”<sup>58</sup> Therefore, he concluded,

50. O’Neil, *supra* note 50, at 2.

51. *Hong v. Grant*, 516 F. Supp. 2d 1158, 1168–69 (C.D. Cal. 2007), *aff’d*, No. 07-56705, 2010 WL 4591419 (9th Cir. Nov. 12, 2010), *quoted in* O’Neil, *supra* note 50, at 2.

<sup>52</sup> O’Neil, *supra* note 50, at 9–10.

53. O’Neil, *supra* note 50, at 10.

54. *Mansoor v. Trank*, 319 F.3d 133, 138 (4th Cir. 2003) (holding for officer), *quoted in* O’Neil, *supra* note 50, at 10.

55. *Green v. Board of County Comm’rs*, 472 F.3d 794, 800–01 (10th Cir. 2007), *quoted in* O’Neil, *supra* note 50, at 13 (alteration O’Neil’s).

56. O’Neil, *supra* note 50, at 20.

57. Nahmod, *supra* note 50.

58. *Id.* at 67–68. Nahmod further notes that this consistency accords with the 1940 AAUP Statement of Principles. *Id.* at 68 n.61.

However, in contrast to my normative approach which is grounded on self-government, the AAUP’s primary rationale appears to be the marketplace of ideas. Thus, the preamble to the AAUP Statement declares in relevant part:

*Garcetti* should not be construed to permit government intrusion in the academic sphere.<sup>59</sup> Nahmod furthermore analogized the academic role within employee-speech doctrine to the student-organization funding mechanism in the government-as-benefactor case, *Rosenberger v. Rector and Visitors of the University of Virginia*.<sup>60</sup> In both situations, Nahmod reasoned, the government is constrained by the First Amendment in the manner of a regulator, despite its appearance as employer or benefactor, because its very intention was to facilitate free speech by independent parties (in one situation by professors, and in the *Rosenberger* scenario by students).<sup>61</sup>

Incidentally, Nahmod also examined the potential impact of *Garcetti* on elementary and secondary education (“K–12”), which he concluded would be negligible, because the government-as-educator line of cases<sup>62</sup> has already established the primacy of governmental interests over individual liberties in that context.<sup>63</sup> The comparison is apt, and I restate it to ground

---

Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition. Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth.

*Id.* (quoting 1940 Statement of Principles on Academic Freedom and Tenure).

59. *Id.* at 73–74.

60. 515 U.S. 819 (1995).

61. Nahmod, *supra* note 50, at 69 (citing *Rosenberger*, 515 U.S. at 835).

62. *Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

63. Nahmod, *supra* note 50, at 61–67; see also Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty After Garcetti*, 33 J.C. & U.L. 313, 314 (2007) (distinguishing higher education and K–12 faculty). See generally Kim Fries, Vincent J. Connelly, & Todd A. DeMitchell, Commentary, *Academic Freedom in the Public K–12 Classroom: Professional Responsibility or Constitutional Right? A Conversation with Teachers*, 227 ED. L. REP. 505, 522–24 (2008) (surveying K–12 teachers and finding in general that they perceive academic freedom as grounded in professionalism and not necessarily in constitutional law); Anne Gardner, Note, *Preparing Students for Democratic Participation: Why Teacher Curricular Speech Should Sometimes Be Protected by the First Amendment*, 73 MO. L. REV. 213, 236–41 (2008) (urging pedagogical foundation for academic freedom of public K–12 teachers); Ann Hassenpflug, Commentary, *Job Duties and Teacher Freedom of Speech*, 220 ED. L. REP. 471, 480–81 (2007) (analyzing *Garcetti* and concluding that public K–12 teachers should not have to choose between job security and responsible challenge to superiors, especially when speaking out is required by law); Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37, 75–77 (2008–2009) (concluding that *Garcetti* should not preclude public K–12 teacher from reporting, e.g., “financial fraud” or condition contrary to “well-being of students”); Alison Lima, Casenote and Comment, *Shedding First Amendment Rights at the Classroom Door?: The Effects of Garcetti and Mayer on Education in Public Schools*, 16 GEO. MASON L. REV. 173, 198–201 (2008) (proposing that *Pickering-Connick* control teacher speech outside the classroom and student-speech analysis be adapted to control teacher speech within the classroom); Ralph D.

the observation that the contract-based solution proposed by this article is analogous to previous proposals to shore up student academic freedom in K–12 and higher education. Student advocates have long pressed for statutory and regulatory solutions to move K–12 student publications from the context of government-as-educator to a *Rosenberger* scenario, promoting free student speech for a number of desirable pedagogical and policy reasons.<sup>64</sup> Student advocates further feared that the government-as-educator doctrine would escape the K–12 box and infect the student university press,<sup>65</sup> contrary to the norms of higher education that Nahmod discussed.<sup>66</sup> This escape occurred in one hard-fought Seventh Circuit case.<sup>67</sup> I previously proposed that advocates for media freedom in higher education learn from the K–12 experience and deploy preemptively the same statutory and regulatory solutions.<sup>68</sup> Similarly here, academics in higher education have something to learn from the experience of students, who for many years already have had to defend their free speech in academic environments against encroachment by the government forum owner.<sup>69</sup>

With the *Garcetti* wolf prowling around the ivory tower, it is critically important that academics and academic institutions well assess and define their mutual understanding of academic freedom as expressed through their

---

Mawdsley & Allan Osborne, *The Supreme Court Provides New Direction for Employee Free Speech in Garcetti v. Ceballos*, 220 ED. L. REP. 457, 465 (2007) (analyzing *Garcetti* and urging error in application on side of free speech of public K–12 teacher); Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of Garcetti v. Ceballos on Public School Educators*, 17 B.U. PUB. INT. L.J. 209, 234–35 (2008) (arguing that *Garcetti* contravenes public interest by silencing worthy whistleblowing in absence of sufficient federal or state statutory protection); Alison E. Price, Comment, *Understanding the Free Speech Rights of Public School Coaches*, 18 SETON HALL J. SPORTS & ENT. L. 209, 244–54 (2008) (urging *Hazelwood* rather than *Garcetti* as desirable framework); Susan P. Stuart, *Citizen Teacher: Damned if You Do, Damned if You Don't*, 76 U. CIN. L. REV. 1281, 1281, 1341–42 (2008) (lamenting that school district “seduc[ti]on by the weapon of *Garcetti*’s absolute power will create unanticipated and legal consequences to both school boards and the educational institution itself”); Ronald D. Wenkart, Commentary, *Public School Curriculum and the Free Speech Rights of Teachers*, 214 ED. L. REP. 1 (2006) (analyzing *Garcetti* and concluding that work-related speech by public K–12 teachers is now clearly unprotected by First Amendment).

64. Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the “College Hazelwood” Case*, 68 TENN. L. REV. 481, 501–08 (2001).

65. *Id.* at 508–12.

66. Nahmod, *supra* note 50, at 67–73.

67. *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc).

68. Peltz, *Censorship Tsunami Spares College Media*, *supra* note 65, at 537–53 (urging college student media to clarify contractual protection for intellectual freedom in anticipation of loss of constitutional safeguards).

69. See Susan P. Stuart, *Citizen Teacher: Damned if You Do, Damned if You Don't*, 76 U. CIN. L. REV. 1281, 1281, 1340 (2008) (offering contractual solution in academic freedom language of model school district collective bargaining agreement).

contractual relationships, apart from the external system of constitutional law.<sup>70</sup> Fortunately, in this vein, the American Association of University Professors has done considerable work in articulating the commonly understood scope of academic freedom, and the norms of the AAUP have been widely adopted by institutions of higher education. The academic-freedom policy articulated in the landmark AAUP 1940 Statement of Principles on Academic Freedom and Tenure has become the boilerplate starting point for the tenure policies of institutions across the United States.<sup>71</sup>

Still, the AAUP articulation of academic freedom focuses on the core functions of research, teaching, and service, and is sparse on detail. Due process is the touchstone of academic-freedom protection in the AAUP framework. As a matter of substantive due process, “cause” is a *sine qua non* of adverse job action against a protected individual, and ample procedural due process also is required. There is no doubt in the AAUP vision that faculty autonomy as against a “for cause” determination embraces a wide range of activities, exceeding the strict, core constructs of teaching, research, and service.<sup>72</sup> For example, an AAUP statement, *On the Relationship of Faculty Governance to Academic Freedom*—recall the plight of Professor Hong, recounted by O’Neil—maintains that “[t]he academic freedom of faculty members includes the freedom to express their views . . . on matters having to do with their institutions and its policies, and . . . on issues of public interest generally, and to do so even if their views are in conflict with one or another received wisdom,” even if the expression does not fall squarely within the traditional cores of published research, classroom teaching, and public-service activities.<sup>73</sup> But AAUP policies collected in its renowned “*Redbook*”<sup>74</sup> offer little more specific articulation of protected faculty activity outside the three pillars.

At the same time, academic freedom, like other civil liberties, faces vigorous perils in our present era of grave concern for public security. This state of affairs has been studied and expounded by the AAUP Special

---

70. E.g., Michael K. Feaga & Perry A. Zirkel, Commentary, *Academic Freedom of Faculty Members: A Follow-Up Outcomes Analysis*, 209 ED. L. REP. 597, 597–607 (conducting quantitative analysis of academic freedom claims to conclude that claimants ought depend on ethical professional, statutory, and contractual bases for academic freedom rather than constitutional law).

71. 1940 Statement of Principles on Academic Freedom and Tenure, *supra* note 1, at 3.

72. See generally NEIL W. HAMILTON, *ACADEMIC ETHICS: PROBLEMS AND MATERIALS ON PROFESSIONAL CONDUCT AND SHARED GOVERNANCE* (2002).

73. On the Relationship of Faculty Governance to Academic Freedom, in AAUP POLICY DOCUMENTS & REPORTS 141, 142 (10th ed. 2006). Shared institutional governance is an established aspect of academic freedom even though it is not squarely within any of the core functions of research, teaching, or service. See, e.g., Paula Wasley, *AAUP Criticizes Rennsalaer Polytechnic Institute Over Faculty Governance*, CHRON. OF HIGHER EDUC. NEWS BLOG, Sept. 24, 2007.

74. AAUP POLICY DOCUMENTS & REPORTS (10th ed. 2006).

Committee on Academic Freedom and National Security in a Time of Crisis, which documented a number of alarming incidents.<sup>75</sup> For example, in the weeks after September 11, 2001, an Orange Coast College professor was suspended for remarks deemed insensitive to Muslim students, and board members of the City University of New York called for the censure of faculty who criticized U.S. foreign policy.<sup>76</sup> At Irvine Valley College in California in 2003, the academic vice president issued a memo admonishing faculty not to discuss the war in Iraq “unless it [could] be demonstrated, to the satisfaction of [his] office, that such discussions [were] directly related to the approved instructional requirements and materials associated with those classes.”<sup>77</sup> Officials of the State University of New York at New Paltz, citing “the best interests of the university,” denied funds to a women’s-studies-program conference on Islam after off-campus groups alleged unbalanced criticism of Israel.<sup>78</sup> Rutgers University in 2003 denied use of university facilities for a student-organized conference on Palestinian solidarity after pro-Israeli politicians objected, though the university pointed to defective paperwork to support its decision and disclaimed any content or viewpoint bias.<sup>79</sup>

In all of these instances cited by the AAUP Special Committee, faculty involvement in the activities deemed objectionable could have been restricted were academic freedom misconstrued as strictly limited to the core functions of teaching, research, and service. But academic freedom is a broader concept, protecting faculty autonomy in commenting on public affairs<sup>80</sup> and in organizing conferences on matters of public interest, even when those activities are not tightly bound to a classroom lecture or published research. That broader concept may be made more explicit than it is at present.

---

75. *Report of an AAUP Special Committee: Academic Freedom and National Security in a Time of Crisis*, ACADEME, Nov.–Dec. 2003, at 34.

76. *Id.* at 52; *see also* Robert M. O’Neil, For the Record: Academic Freedom and National Security, <http://www.aaup.org/AAUP/issues/AF/oneilFTR.htm> (2004) (last visited Dec. 21, 2007) (speech delivered June 12, 2004, in Washington, D.C., to AAUP annual meeting), *available at* <http://www.aaup.org/NR/rdonlyres/5D2D9A5A-1935-4DF4-B402-57525CAF8CDD/0/Post911.pdf> (last visited June 29, 2009).

77. *Report of an AAUP Special Committee*, *supra* note 75, at 54.

78. *Id.* at 55.

79. *Id.*

80. Post-9/11 fear is a highly visible threat to academic freedom, but certainly the traditional threat of partisan sniping is ever-present. *See, e.g.*, Robin Wilson, *AAUP Goes to Bat for “Freedom in the Classroom,”* CHRON. OF HIGHER EDUC., Sept. 12, 2007 (citing AAUP, *Freedom in the Classroom* (2007)).

## II. INTERPRETING THE TENURE CONTRACT TO DESCRIBE PENUMBRAL ACADEMIC FREEDOM

### A. Academic Freedom and the 1940 AAUP Statement of Principles

To protect academic freedom, and to preserve the intellectual freedom that is essential to a flourishing culture and economy, it is timely, appropriate, and essential to further elaborate a common understanding, or interpretation—not necessarily a new articulation—of the scope of protected academic freedom guaranteed by the language of the 1940 AAUP Statement of Principles, from which tenure contracts are commonly derived. The Statement states in relevant parts:

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to ensure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

#### *Academic Freedom*

(1) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(2) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be



clearly stated in writing at the time of the appointment.

(3) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.<sup>81</sup>

The Statement well describes the core academic functions. It only modestly alludes to more: “extramural activities” as an end of tenure, and the references in numbered paragraph (3) to speech by professors as citizens rather than as institutional representatives. An additional 1964 AAUP Statement on Extramural Utterances bolsters the freedom of the professor speaking as citizen—*e.g.*, “[e]xtramural utterances rarely bear upon the faculty member’s fitness for continuing service”<sup>82</sup>—but does little to clarify when the professor speaks in an extramural rather than institutional role. The universe of academic activities within the scope of academic freedom is broader than the core academic functions, as depicted in Figure 1.

---

81. 1940 Statement of Principles on Academic Freedom and Tenure, *supra* note 1, at 3–4.

82. Committee A Statement on Extramural Utterances, *in* AAUP POLICY DOCUMENTS & REPORTS 32, 32 (10th ed. 2006).

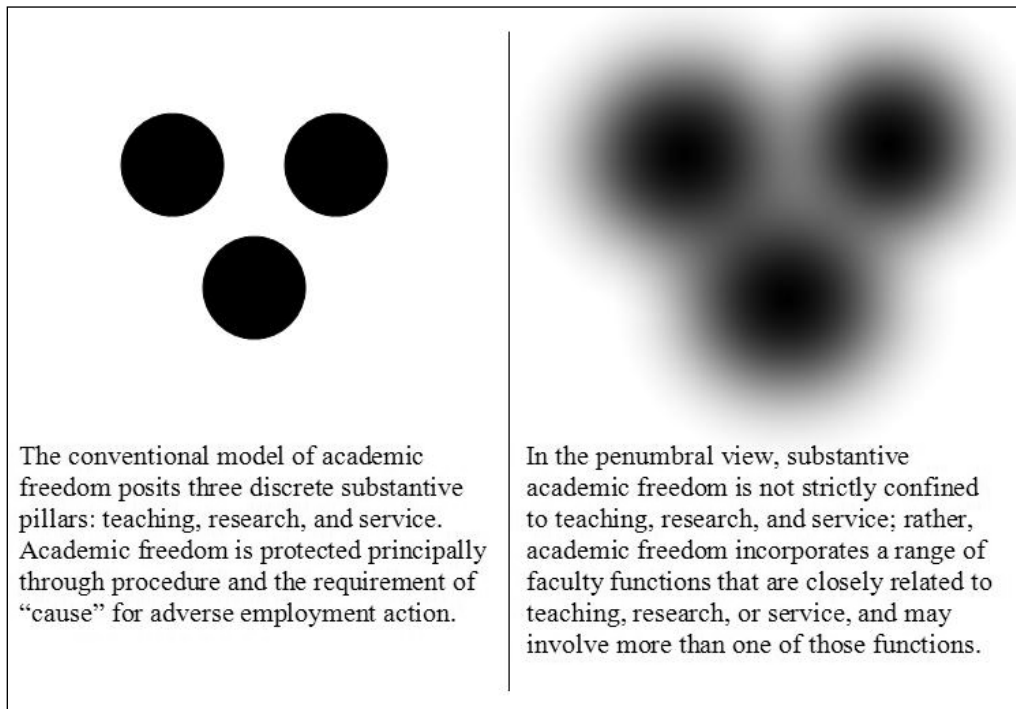


Fig. 1: Academic Freedom

The reference in the Standard to speech as performed by citizens causes more confusion than it alleviates, especially under the *Pickering-Garcetti* doctrine. The dichotomy drawn by the Statement—between professor as institutional spokesperson and professor as commentator on matters within a discipline—is not the same dichotomy drawn by the case law—between professor as employee-speaker, which may include either of the paragraph (3) roles, and professor as citizen-speaker, outside the administrative reach of the institution. In other words, there are really three possibilities: (1) professor as institutional spokesperson, within institutional administrative control per *Pickering-Garcetti*, or per government-as-speaker or doctrine; (2) professor purely as private citizen, such as a biology professor who takes part in a weekend anti-war demonstration, wholly beyond institutional administrative control per *Pickering-Garcetti*; or (3) professor in official but individual capacity, a role that should implicate academic freedom but may not amid extension of *Garcetti* to academics.

The preoccupation of this article is in defining this third role, and redressing the deficiency of the 1940 (and 1964) Statement in describing much of what professors do from day to day. Much of the professor’s job outside the classroom and the research journal involves functions critical to the academy and integral to the public interest, such as faculty governance and peer-performance review. Effective performance of these functions,

which in the Statement are not explicit (and at best are only alluded to), requires freedom of expression and inquiry.

B. The “Proposed Interpretation Concerning Closely Related Activities”

Thus to the end of adding clarity while remaining true to the spirit of the Statement, this article proposes the following Interpretation. This text, and the Illustrations that are appended to this article, were developed by an *ad hoc* committee of the Faculty Senate at the University of Arkansas at Little Rock.<sup>83</sup> In the wake of *Garcetti*, the Faculty Senate charged the committee with “study[ing] the adequacy of the University tenure contract to protect academic freedom,” and “mak[ing] recommendations accordingly to protect academic freedom.”<sup>84</sup> The committee described faculty activities “closely related” to the three pillars of the Statement, a class of functions described in this article as “penumbral.”

*Proposed Interpretation Concerning Closely Related Activities*

(1) As faculty responsibilities evolve, a need arises to elaborate a common understanding of the academic freedom that is guaranteed by [University Policy based on the 1940 AAUP Statement of Principles]. [University Policy] is clear in that the core functions described in subsections (1), (2), and (3) are exemplary and neither limit nor exhaust the scope of academic freedom. In addition to the core functions of research, teaching, and service, faculty conduct activities that are closely related to those core functions. Accordingly, the broad conception of academic freedom expressed in [University Policy] protects faculty engaged in those closely related activities. The following statements therefore further exemplify, while still neither limiting nor exhausting, the scope of academic freedom that is protected by [University Policy].

(a) Faculty members are entitled to freedom in the selection of classroom instructional materials, regardless of medium or source.

(b) Faculty members are entitled to freedom in advising students.

---

83. The committee was ably served by Carlton M. “Sonny” Rhodes, assistant professor in the School of Mass Communication; Roby D. Robertson, professor and director of the Institute of Government; Olga Tarasenko, assistant professor in the Department of Biology; and C.F. Williams, professor in the Department of History. I chaired.

84. Memorandum from Ad Hoc Faculty Senate Committee to Study Academic Freedom and Tenure, to Faculty Senate, University of Arkansas at Little Rock 1 (Feb. 25, 2008) (copy on file with author).

(c) Faculty members are entitled to freedom in their involvement with campus organizations.

(d) Faculty members are entitled to freedom in the course of faculty governance.

(e) Faculty members are entitled to freedom of expression both within and outside the institution.

(f) Faculty members are entitled to freedom of participation in scientific, research, or educational meetings, and in the organization of conferences.

(2) As has always been the case under [University Policy], acts which interfere with the freedom of faculty to pursue these activities, as well as acts which, in effect, deny the freedom to speak, to be heard, to study, and to administer, are the antithesis of academic freedom. Moreover, for purposes of legal analysis under the First Amendment, faculty engaged in research, teaching, service, and closely related activities are presumed to be speaking on matters of public concern, regardless of whether the matter affects the interests of the speaker.

(3) As has always been the case under [University Policy], academic freedom does not mean absolute discretion to pursue any agenda without regard for the pedagogical mission of the university. Individual academic choices may be limited by policies that are reasonable and viewpoint neutral, and adopted by duly authorized bodies of the faculty for pedagogical reasons. In matters of alleged interference with academic freedom, due process remains the analytical touchstone such that interference may never be sanctioned when not “for cause” or when lacking the provision of ample procedural safeguards.<sup>85</sup>

This Interpretation may be adopted by faculties as the governing bodies of their institutions. Like the 1940 AAUP Statement of Principles, the Interpretation is suitable for public and private institutions. Faculty understanding of tenure policy that is plainly consistent with the broader, purposive policy goal of academic freedom, especially if uncontradicted by administrative response, should be influential if not controlling in later construction, whether by administrative entities or courts, on the question of what constitutes “cause” for permissible discipline or dismissal. Better, the Interpretation may be adopted jointly by faculties, administrators, and governing boards, as a reflection of an institution’s commitment to academic freedom as a bedrock value in twenty-first-century higher education. The legal effect of such adoption would then be incontrovertible.

The Interpretation operates by supplementing the Statement’s

---

85. *Id.* at 7.

explication of the core academic functions. Added as exemplary activities are those that are commonplace in the performance of faculty duties, and that are closely related to, but not solidly within, the core academic functions of teaching, research, and service—in other words, penumbral. Some of these activities have been the subject of prior disputes, reported in lawsuits and in AAUP investigations. Others are born of experience and will be familiar to faculty.

The penumbral rights and responsibilities described in the Interpretation are to be bolstered by broad construction. To that end, paragraph (2) restates the laudable purpose of academic freedom. Moreover, paragraph (2) resists extension of *Garcetti*'s “official duties” analysis to academics, setting “public concern” in the *Pickering* threshold test as the presumptive state of affairs. The latter sentence of paragraph (3) means to preserve the key procedural safeguards and substantive requirement of “cause,” which lie at the heart of the AAUP-designed defense of academic freedom.

Like the academic-freedom interests asserted by the Statement, the penumbral rights and responsibilities of the Interpretation are not absolute, but subject to limiting principles. Paragraph (3) recognizes countervailing institutional interests in sound pedagogy. Limits on the penumbral rights and responsibilities of individual faculty must be (1) reasonable, (2) viewpoint neutral, (3) adopted by authorized bodies of the faculty, and (4) pedagogically justified. The elements of reasonableness and pedagogical soundness derive from the *Hazelwood v. Kuhlmeier* approach to student free speech in curricular contexts,<sup>86</sup> a number of scholars having expressed a fondness for application of *Hazelwood* rather than *Garcetti* to the academic-speech problem.<sup>87</sup> Viewpoint neutrality is derived from general First Amendment principles forbidding government from imposing an official orthodoxy on free thought and expression.<sup>88</sup> Viewpoint neutrality is thus consistent with the Supreme Court's no-“pall of orthodoxy” principle in academic freedom,<sup>89</sup> and with scholarly criticism

---

86. 484 U.S. 260 (1988); see, e.g., Peltz, *Censorship Tsunami Spares College Media*, *supra* note 65, at 491–501.

87. E.g., Alison E. Price, Comment, *Understanding the Free Speech Rights of Public School Coaches*, 18 SETON HALL J. SPORTS & ENT. L. 209, 244–54 (2008). It is some comment on the sad state of academic freedom that the *Hazelwood* approach, designed for K12 children, would be a more protective framework than the employee-speech doctrine. Cf. Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights*, 14 TEX. J. CIV. LIBERTIES & CIV. RTS. 27 (2008) (arguing for inapplicability of *Hazelwood* framework to college students, because as adults they are vested with full constitutional liberties).

88. See, e.g., Richard J. Peltz, *Pieces of Pico: Saving Intellectual Freedom in the Public School Library*, 2005 B.Y.U. EDUC. & L.J. 103, 135–36 (discussing Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982)).

89. *Keyishian*, 385 U.S. 589, 603 (1967).

of *Hazelwood* for its failure to prohibit viewpoint-based censorship.<sup>90</sup> Finally, the faculty element ensures that pedagogical decision-making is not utterly ceded to administrative officials to run roughshod over individual liberty, but remains at some level in the hands of faculty, who bear primary responsibility for executing the pedagogical mission of the educational institution.

*Faculty members are entitled to freedom in the selection of classroom instructional materials.* The selection of classroom instructional materials is obviously closely related to, and follows logically from, the freedom of classroom discussion. Instructors and teachers often clash over classroom instructional materials—a term drafted broadly enough to include traditional paper handouts, as well as electronic media and visual aids. But school authorities sometimes wish to designate materials for uniformity, for pedagogically sound reasons; for example, a single textbook might be chosen to ensure that all first-year statistics students cover the same basic skills. Accordingly, for example, in a junior-college English class, a professor circulated a poem “liberally sprinkled with Anglo-Saxon obscenities, slang references to male and female sexual organs and to sexual activity, and profane references to Jehovah and Christ,” and a pamphlet “contain[ing] nine photographs of an entwined nude couple,” suggestive of sexual intercourse.<sup>91</sup> The materials supported a discussion of indecency and censorship.<sup>92</sup> With reference to a statute governing teacher dismissal, the Supreme Court of California affirmed a ruling for the professor, pointing *inter alia* to “the absence of regulations defining the content and suitability of supplemental teaching materials.”<sup>93</sup> The Interpretation would not preclude the development of such regulations in keeping with the requirements of paragraph (3).

*Faculty members are entitled to freedom in advising students.* Student advising, a form of service closely related to teaching, is an important faculty function in which independence is essential. Students depend on faculty for full and frank advice, and what is in a student’s best interests is not necessarily in the institution’s best interests, at least in the short term. For example, my university, like many, prizes student retention. But a student’s career goals or family demands might dictate advising a student to transfer to another institution, or to postpone studies for a time.<sup>94</sup> In the

---

90. E.g., Peltz, *Censorship Tsunami Spares College Media*, *supra* note 65, at 501–08.

91. Board of Trustees v. Metzger, 8 Cal.3d 206, 208, 104 Cal. Rptr. 452 (Cal. 1972).

92. *Id.*

93. *Id.* at 211.

94. For the record, I have never been impeded by my university in student advising. But *Garcetti* and the threat of firing discussed in part I.A, *supra*, have made

recent *Gorum v. Sessoms*, a professor advised a student to sue the university after the student was suspended for possessing a firearm on campus under a no-tolerance policy.<sup>95</sup> Professor Gorum was in hot water on a number of other university charges,<sup>96</sup> and the Third Circuit ultimately upheld a judgment against him on various grounds.<sup>97</sup> Significantly, the Third Circuit nevertheless upheld application of *Garcetti* to support the adverse outcome on the student-advising claim.<sup>98</sup> Whatever the particulars of the *Gorum* case, a professor who rationally believes that a student has a cause of action against the university—imagine a claim of disability non-accommodation—should be free to direct the student to a lawyer, even if to the university’s dismay. The Interpretation makes room for such full and frank advice.

*Faculty members are entitled to freedom in their involvement with campus organizations.*<sup>99</sup> Many years ago, I interviewed for the position of student-publications adviser at a small public university in Louisiana. A university vice president ultimately posed a question: what would I do if the university told me to keep a story out of the student newspaper, and the students wanted to run it? I gave an ambivalent answer about discussing the university concerns with the students, in the context of journalistic values and ethics. The vice president said (more than asked), “You understand, don’t you, that the university signs your paycheck.” I did not get the job, and I was spared a choice that too many college media advisers have faced, between professional responsibility and the employer’s short-term expectations.<sup>100</sup> Academic freedom should provide the responsible professor the security to choose the former. Similarly, one of the asserted offenses of the aforementioned Professor Gorum arose in the context of his advisership of the campus chapter of the Alpha Phi Alpha fraternity.<sup>101</sup> The Third Circuit invoked *Garcetti*’s “official duties” analysis upon observing a university rule that charged faculties with a responsibility for “involvement with student organizations and clubs as mentors and advisors.”<sup>102</sup> But again, *Garcetti* was not the proper mode of analysis. The Interpretation encompasses this faculty right and responsibility, a form of

---

me reticent to provide full and frank advice in all circumstances.

95. 561 F.3d 179, 185 (3d Cir. 2009).

96. *Id.* at 182–84.

97. *Id.* at 188.

98. *Id.* at 185–86.

99. *Cf.* Joint Statement on Rights and Freedoms of Students, in AAUP POLICY DOCUMENTS & REPORTS 273, 274–75 (10th ed. 2006) (guaranteeing student freedom of association in organizational affairs, including freedom to choose faculty adviser).

100. *See, e.g.*, Vincent F. Filak & Scott Reinardy, *College Journalism Advisers Able to Ward Off Stress, Burnout*, C. MEDIA REV., Spring 2009, at 15, 15–16 (discussing clashes between university administrators and college media advisers).

101. *Gorum v. Sessoms*, 561 F.3d 179, at 184.

102. *Id.* at 184–85.

service closely related to teaching and student advising.

*Faculty members are entitled to freedom in the course of faculty governance.*<sup>103</sup> As stated several times already, the faculty right and responsibility of governance, a form of service, requires independence from university overseers. Were there no such independence, there would be no point in having structures of faculty governance apart from the university administration. The overwhelming number of disputes between faculty and administrators over matters not within the teaching, research, and service cores, documented by the courts and by the AAUP, concern faculty governance, specifically manifested in criticism of institutional policies and calls for reforms. Thus *Hong v. Grant*<sup>104</sup> was the prototype case that animated O'Neil's introduction to the *First Amendment Law Review* symposium.<sup>105</sup> Professor Hong was denied a merit pay increase after he was critical of the appointment and promotion process, and of the use of lecturers rather than tenured faculty to teach key courses in his discipline.<sup>106</sup> Hong lost after the district court applied *Garcetti*.<sup>107</sup> The Interpretation would fix faculty governance within the academic-freedom constellation, and would rate *Garcetti* as presumptively inapplicable.

*Faculty members are entitled to freedom of expression both within and outside the institution.*<sup>108</sup> A guarantee of free expression for faculty, both internally and externally, in part overlaps with protections for other activities, such as faculty governance. But the guarantee leaves no room for doubt as to the presumptively protected status of extramural utterances, whether on or off campus. In Wisconsin, Professor Kevin Renken complained to officials at the University of Wisconsin-Milwaukee about what he believed was improper use of federal grant funds.<sup>109</sup> Because Renken's official duties included the administration of grant funds, the Seventh Circuit had no trouble applying *Garcetti* to rule in favor of the university on the professor's retaliation claim.<sup>110</sup> In Florida, Professor Sami Al-Arian became entangled in an academic-freedom battle with the University of South Florida after federal law-enforcement officials

---

103. See generally On the Relationship of Faculty Governance to Academic Freedom, *supra* note 73.

104. 516 F. Supp. 2d 1158 (C.D. Cal. 2007), *aff'd*, No. 07-56705, 2010 WL 4591419 (9th Cir. Nov. 12, 2010).

105. O'Neil, *supra* note 50, at 2.

106. *Hong*, 516 F. Supp. 2d at 1162-65.

107. *Id.* at 1165-70.

108. See generally Committee A Statement on Extramural Utterances, *supra* note 82; Statement on Professors and Political Activity, in AAUP POLICY DOCUMENTS & REPORTS 33 (10th ed. 2006).

109. *Renken v. Gregory*, 541 F.3d 769, 773 (7th Cir. 2008).

110. *Id.* at 773-75.



mistakenly implicated him in a terrorism investigation.<sup>111</sup> The professor's notoriety catapulted him to a September 26, 2001 television appearance on *The O'Reilly Factor*, which in turn prompted "intens[e] . . . public reaction," "perceived threats to the safety of Professor Al-Arian and others," and on one occasion the evacuation of the university computer-science building. The university asserted that Al-Arian had violated a collective bargaining agreement "to indicate when appropriate that one is not an institutional representative."<sup>112</sup> Ruling against the university, an AAUP investigative committee concluded that Al-Arian's academic freedom had been violated by a consequent threat of dismissal.<sup>113</sup> The committee, chaired by Professor Van Alstyne, explained that Al-Arian clearly had not been speaking as a representative of the institution, even though he was identified as a USF professor:

Professor Al-Arian obviously did not preface each of his off-campus interviews or appearances with a disclaimer—for example, "None of my remarks should be misunderstood to represent the views of the University of South Florida, or any division, department, or group associated with the university, its alumni, its administration, or its board of trustees"—but the investigating committee can find no reasonable warrant for such an extraordinary and gratuitous disclaimer, nor was the committee advised of *any* other instance in which this kind of disclaimer was expected of others at the university . . . . The circumstance in which the norms of sound academic practice might require such a statement would ordinarily be the exceptional one in which confusion of roles might otherwise occur, that is, in which some audience might assume one was a "spokesperson" or a "representative" of some sort.<sup>114</sup>

The Interpretation would effect freedom of speech for faculty on and off campus and presumptively preclude the "official duties" analysis of *Garcetti*. Renken would have been afforded latitude, at least presumptively, to lodge his internal complaints, and USF would be precluded presumptively from invoking *Garcetti*'s "official duties" approach simply by virtue of Al-Arian's media identification by professional association.

*Faculty members are entitled to freedom of participation in scientific, research, or educational meetings, and in the organization of conferences. Colloquia and conferences are critical media for the dissemination of*

---

111. *Academic Freedom and Tenure: University of South Florida*, ACADEME, May–June 2003, at 59, 60.

112. *Id.* at 65–66.

113. *Id.* at 69.

114. *Id.* at 66.

academic knowledge and expression, and for the back-and-forth of academic inquiry and challenge. The colloquium *is* a marketplace of ideas, so official interference in that marketplace directly implicates the dreaded “pall of orthodoxy.” Few cases explore this problem, but it is not difficult to imagine a dispute arising. For example, U.S. federal regulations disallow U.S.-headquartered organizations from sponsoring professional meetings or conferences in Cuba.<sup>115</sup> The Interpretation would afford a faculty member latitude for lawful attendance at an educational conference in Cuba, organized by a foreign sponsor, free of threatened retaliation by a university administration that favored absolute terms for the U.S. embargo.

The committee that developed the Interpretation furthermore developed a series of Illustrations, which demonstrate the operation of the penumbral rights and responsibilities, as well as the limiting principles.<sup>116</sup> Like the penumbral rights and responsibilities of the Interpretation, the Illustrations are exemplary and non-exhaustive. The committee developed the Illustrations by drawing upon hypotheticals and anecdotal experiences collected in the course of research. These Illustrations are appended to this Article.<sup>117</sup>

### III. CONCLUSION

The Interpretation means to ensure a zone of academic freedom on which faculty can rely when exercising and fulfilling their many rights and responsibilities, without fear that academic freedom may be eroded upon the vagaries of judicial interpretation over time, or will fail entirely for the omission of constitutional doctrine. In this vein, the Interpretation eschews the impact of the triple threat to academic freedom as a constitutional concept, as described by Professor Van Alstyne and others, especially since *Garcetti*. The Interpretation and Illustrations mean to bolster academic freedom through contract language, manifesting the evident intention of the 1940 AAUP Statement of Principles, to facilitate a thriving marketplace of ideas in the university, and thereby to ensure that the leaders of our communities, states, and nation are “trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritarian selection.”<sup>118</sup>

While the Interpretation and Illustrations map strides toward the preservation of academic freedom, the committee that developed these

---

115. See 31 C.F.R. § 515.564(a)(2)(i). A challenge, based in part on academic freedom, to federal restrictions on educational travel to Cuba under 31 C.F.R. § 515.565 was rejected in *Emergency Coalition to Defend Educational Travel v. U.S. Dep’t of the Treasury*, 545 F.3d 4 (D.C. Cir. 2008).

116. See Appendix.

117. *Id.*

118. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (internal quotation marks, marks of prior alteration, and citations omitted).

texts was fully cognizant of threats that the proposal will not abate, and which also merit attention, but which are beyond the scope of this article. First, it is not clear that contractual protection by itself, without complementary constitutional safeguards, will be adequate to protect academic freedom.<sup>119</sup> The law of contracts is more vulnerable than constitutional law to goal-oriented methods such as strategic drafting and political manipulation, and is more readily subject to being overwhelmed by fleeting public passions. Vigilance is required, and the cause of academic freedom as a constitutional construct should not be abandoned. Second, the proliferation of non-tenure-track positions, often superseding tenure-track positions, threatens to moot the very question of what tenure means.<sup>120</sup> Investigation and vigilance are warranted as to systems of tenure, within and across institutions, inquiring into the range of personnel who are eligible for tenure, and the process by which tenure is awarded. Academic freedom should not be reserved as a privilege for an elite slice of the academic community,<sup>121</sup> but should animate the entire university as part of a consistent philosophy of free expression and inquiry.

---

119. Memorandum, *supra* note 85, at 6.

120. *Id.*

121. See generally, e.g., John Gravois, *Labor Union Plants a Flag for Academic Freedom in an Era of Fewer Tenured Positions*, CHRON. OF HIGHER EDUC., Oct. 29, 2007 (citing American Federation of Teachers, *Academic Freedom in the 21st-Century College and University*); John Gravois, *Tracking the Invisible Faculty*, CHRON. OF HIGHER EDUC., Dec. 15, 2006 (citing AAUP, *Contingent Faculty Index*); Donna Euben, *Legal Contingencies for Contingent Professors*, CHRON. OF HIGHER EDUC., June 15, 2006; Donna R. Euben, AAUP, *Tenure: Perspectives and Challenges*, <http://www.-aaup.org/AAUP/protect/legal/topics/tenure-perspectives.htm> (2002) (last visited Dec. 21, 2007).

## APPENDIX

*Illustrations in Support of the Proposed Interpretation Concerning Closely Related Activities*<sup>122</sup>

The following Illustrations mean to demonstrate principles embodied in [University Policy], as articulated specifically through the Interpretation Concerning Closely Related Activities. The Illustrations are in no way limiting or exhaustive of the scope of academic freedom described by [University Policy] and the Interpretation Concerning Closely Related Activities.

(1) Selection of Classroom Instructional Materials. Professor A in the English Department chooses a controversial novel for an introductory literature course. She believes as a pedagogical matter that the novel is appropriate to the course. The head of the department objects to the choice, deeming the book unsuitable as insufficiently challenging. Professor A's adoption decision is protected by academic freedom, because the selection of classroom instructional materials is an activity closely related to teaching.

Subsequently, for viewpoint-neutral and pedagogical reasons, the faculty of the English Department duly adopts a uniform reading list for all introductory literature courses. Professor A's previous selection is not on the list. Professor A subsequently must abide by the decision of the faculty and may suffer adverse employment action for failure to do so.

(2) Student Academic Advising. Professor B in the Political Science Department advises a student who wishes to study historical Soviet politics to consider transfer to another institution, because the university offers limited resources in that area. In the interest of student retention, university administrators direct faculty to advise students against transfer. Professor B's advising of the student is protected by academic freedom, because even informal student advising is an activity closely related to teaching and service. The student advising directive may not be enforced against Professor B, because it unreasonably burdens his discretion in conducting pedagogically sound student advising.

Subsequently, Professor B's department head directs faculty when advising students ensure that they take the department's course in ethics, which is a graduation requirement. The course requirement exists for viewpoint-neutral and pedagogically sound reasons, and was duly adopted

---

122. These Illustrations are derived from, and quote extensively from (without marks) Memorandum, *supra* note 85, at 8–10. The committee chose to describe scenarios in which the professor prevailed; the Illustrations here further develop the committee scenarios to demonstrate in each instance where a professor would go too far.

by the departmental faculty. Professor B tells an advisee not to take the ethics course, and instead to apply to the faculty for a waiver, because Professor B believes that the ethics course wastes students' time. Professor B is bound by the advising directive and may suffer adverse employment action for failure to abide by the directive. The advising directive is a reasonable burden on Professor B's discretion in student advising.

(3) Student Conduct Advising. Upon a student's request and with the permission of the head of the Business Department, Professor C sits in a meeting between the student and the department head to discuss allegations of plagiarism against the student. The student is not taking any classes from Professor C, but the student trusts Professor C as a neutral observer who is not involved in the matter under consideration. Subsequently, the student is disciplined upon the authority of the head of the Department. Believing that the student has grounds for appeal, Professor C advises the student as to established university procedures for the appeal of disciplinary matters, as well as the student's right, consistent with university procedures, to seek professional outside counsel. Professor C's advising of the student is protected by academic freedom, because student advising is a function closely related to teaching and service. Whether Professor C and the head of the Department differ on the appropriate outcome of the matter has no bearing on the scope of protected activity.

In an unrelated matter, Professor C is assigned to serve on a neutral adjudication panel in a campus disciplinary matter. The disciplinary process follows an established procedure, duly adopted by an authorized faculty body and soundly respecting the due process rights of persons accused of misconduct. Professor C is contacted in confidence by a student witness in the matter who confesses that he fabricated the accusation that initiated the matter. Professor C advises the witness to maintain his story and not to reveal the fabrication, lest the witness himself face charges of misconduct. The witness maintains his story, and Professor C informs no one. Thus upon false testimony, the adjudication panel finds the accused responsible for misconduct. Upon a later administrative appeal, the deception and communication with Professor C are revealed. Professor C's advice to the witness is not protected by academic freedom, and Professor C may suffer adverse employment action for having failed to fulfill the role of neutral adjudicator in accordance with the disciplinary process. Even if Professor C might have been bound to maintain the confidence of the witness, Professor C improperly advised the witness to disrupt the disciplinary process with perjury, and Professor C thereafter countenanced a violation of the rights of the accused.

(4) Campus Organization Participation. Upon invitation, Professor D in the Religion Department participates in a debate sponsored by the Lesbian, Gay, Bisexual and Transgender Student Association. Professor D vehemently asserts the position that homosexuality is a sin. Professor D's participation in the debate is protected by academic freedom, both because

participation in a campus organization is closely related to teaching and service, and because the expression, however vehemently, of an opinion, however controversial, may not constitute cause for adverse employment action.

Subsequently, Professor D is assigned the responsibility of adviser to the student newspaper. By university policy, duly adopted by an authorized faculty body, the student newspaper enjoys editorial independence, free of viewpoint-based regulation by any university actor. Professor D disagrees with the position of a planned student editorial opposing a referendum ban on gay adoption, so Professor D pulls the editorial from production. Professor D's censorship is not protected by academic freedom, and Professor D may suffer adverse employment action for violating the viewpoint-neutrality policy that governs the university-newspaper relationship.

(5) Internal Policy Statement, Distinterested Speaker. Professor E in the French Department writes a memo to her departmental colleagues asserting that the placement testing of incoming students is inaccurate. Professor E's position is at odds with the conclusion of the French Department Assessment Committee, which just concluded a study of the incoming placement testing. Professor E is accused of being "non-collegial." Professor E's expression is protected by academic freedom, both because her expression is closely related to service through faculty governance and to teaching, and because the expression of an opinion, however controversial, may not constitute cause for adverse employment action. Whether Professor E is perceived as "collegial" has no bearing on the scope of protected activity.

Subsequently, an authorized faculty body, for viewpoint-neutral and pedagogical reasons, duly adopts a departmental policy requiring that incoming students with common, qualifying placement scores are to be started at the same point of study in the second-level course, French 161, which is taught in three sections. Lacking confidence in the efficacy of the placement test, Professor E on the first morning of classes distributes a memo to the other two teachers of French 161, indicating Professor E's intention to use an attached supplementary placement test and to sub-divide her French 161 students into groups according to the results, with different plans of study in defiance of the departmental policy. In the memo, Professor E entreats the other teachers to defy the policy similarly. Had Professor E circulated the memo a week earlier as a proposal for amendment to existing policy, rather than as a call for imminent defiance, the circulation would have been protected by academic freedom. But Professor E's expression is not protected by academic freedom, because the memo means to facilitate the imminent defiance of a binding policy. Accordingly, Professor E may be subject to adverse employment action.

(6) Internal Policy Statement, Interested Speaker. Professor F in the Biology Department writes a memo to the departmental faculty stating that

the head of the department has shown poor judgment by placing resources in student placement, rather than in faculty research, and that the head should be removed. Because of the department's fiscal priorities, Professor F suffers a reduction in funding. Professor F is accused of acting in self-interest and in not being a "team player." Professor F's expression is protected by academic freedom, because Professor F's expression is closely related to service through faculty governance, and to teaching and research, and Professor F is presumptively commenting on a matter of public concern, even though the matter affects him. Professor F's expression is also protected because the expression of an opinion, however controversial, may not constitute cause for adverse employment action. Whether Professor F is perceived as a "team player" has no bearing on the scope of protected activity.

Subsequently, Professor F writes another memo to the departmental faculty. In the second memo, Professor F accuses the head of the Biology Department of receiving a financial kickback from a pharmaceutical company for having cut funding to Professor F's research, because Professor F's research might have resulted in the development of a product that would diminish the company's profit margin on an existing product. The charge is false and reckless; the head of the department has had no such interaction with the pharmaceutical company. Professor F's expression is not protected by academic freedom, because Professor F's expression is false, reckless, and injurious to the reputation of a colleague. Professor F's expression is not protected as a statement of opinion, because the expression constitutes a false assertion of fact. Professor F is presumed to have commented on a matter of public concern, but made with recklessness, such expression still may subject Professor F to adverse employment action.

(7) External Policy Statement, Public Affairs. Professor G in the Sociology Department is quoted in the newspaper as an expert stating that government entitlement programs hurt the poor more than help the poor. Professor G did not tell the reporter that she was not speaking on behalf of the university, but she did not affirmatively purport to speak on behalf of the university. Professor G's expression is protected by academic freedom, both because her expression as an expert is closely related to service and research, and because the expression of an opinion may not constitute cause for adverse employment action. Because Professor G was consulted in her capacity as an expert, it was not necessary to disclaim her affiliation with the university. It was evident under the circumstances that Professor G was not purporting to espouse an official position of the university.

Subsequently, Professor G is quoted in the newspaper asserting opposition to a referendum bond issue that would support state educational institutions, including the university. Professor G opposes the bond issue because she opposes government debt to support public works as a matter of social policy. However, Professor G is correctly quoted in the

newspaper having said, "Everyone at the university, outside the athletic department, opposes the bond, because the money is going to be wasted on building a new athletic stadium." Professor G expressly neither asserted nor disclaimed representation of the university on the issue; in fact, the official university position supports the bond issue because of the indirect academic benefits of a vibrant athletic program. Professor G's expression is not protected by academic freedom because she purported, without authority or disclaimer, to express an opinion on public affairs on behalf of other university officials. That Professor G expressed a mere opinion does not save her, because the opinion was not propounded as merely her own, and the attribution of that opinion to all academic officials was a false assertion of fact. Professor G may suffer adverse employment action for having purported to speak on behalf of the institution with neither authority nor disclaimer.

(8) External Policy Statement, Institutional Affairs. Professor H in the Law Department is quoted in the newspaper stating that the university places too much emphasis on recruitment and insufficient emphasis on placement. Professor H told the reporter that he was not speaking on behalf of the university, but that disclaimer does not appear in the story. Professor H's expression is protected by academic freedom, both because his assessment of university policy is closely related to service through faculty governance and to teaching, and because the expression of an opinion, however controversial, may not constitute cause for adverse employment action. Professor H properly disclaimed representation of the institution, and he is not responsible for the subsequent failure of a third party to perpetuate the disclaimer.

Subsequently, Professor H is quoted in the newspaper stating that fewer than half of law graduates have jobs upon graduation, and using this statistic as evidence to support his argument that the university expends insufficient resources on placement. In fact, the law placement rate upon graduation is ninety percent, and has never been lower than fifty percent. There is no foundation for Professor H's misstatement. Professor H's expression is not protected by academic freedom because he recklessly misstated a fact to the detriment of the institution. His expression is not protected as opinion, because he made a false factual assertion. Professor H may be held responsible for his expression regardless of whether he disclaimed representation of the institution, though a disclaimer may mitigate his offense.

(9) External Policy Statement, Whistleblower to Private Entity. Professor J in the Journalism Department urges a regional accrediting authority of journalism departments to determine whether the department awards more credits than permitted in certain subjects, according to accreditation standards, for students pursuing degrees in the department. Professor J does not know whether the department is at fault, because she does not have access to records that would demonstrate the department's



culpability. She does hope that the ensuing scandal will prompt a disliked department head to step down. But Professor J is not reckless in urging the authority to make the inquiry. The department's accreditation is consequently jeopardized. Professor J's communication is protected by academic freedom, because the communication is closely related to service through faculty governance, and to teaching, and because Professor J has not asserted a fact she knows to be false, nor asserted a fact with reckless disregard of its truth or falsity. The department may prefer that Professor J first have worked internally to correct any misunderstanding, but Professor J's failure to do so is not cause for adverse employment action. Whether Professor J bore ill will to the department head, and whether the accrediting authority ultimately determines that wrongdoing occurred are circumstances that have no bearing on the scope of protected activity.

Subsequently, Professor J urges the regional accrediting authority to investigate whether the Journalism Department has been falsifying grades for student-athletes to prevent them from failing. In fact, Professor J has no reason to believe that such falsification has occurred, but Professor J wishes to spark a scandal that might prompt a disliked department head to step down. The department's accreditation is consequently jeopardized. Ultimately, no wrongdoing is uncovered, and the department is reaccredited. Professor J's communication is not protected by academic freedom, because Professor J asserted a fact that she knew to be false, or posited a damaging accusation in reckless disregard of its truth or falsity. Whether Professor J bore ill will to the department head has no bearing on this conclusion; Professor J's recklessness is the dispositive circumstance.

(10) External Policy Statement, Whistleblower to Public Entity. Professor K in the Political Science Department reports to the Department of Education that the Political Science Department has disclosed student information in a manner contrary to the Family Educational Rights and Privacy Act. Professor K believes that such a wrong occurred and also hopes that the ensuing scandal will prompt a disliked department head to step down. Professor K's communication is protected by academic freedom, both because the communication is closely related to service through faculty governance, and because the communication is protected by the First Amendment right to petition, regardless of whether the matter concerns Professor K personally. The Department may prefer that Professor K first have worked internally to correct any misunderstanding, but Professor K's failure to do so is not cause for adverse employment action. Whether Professor K bore ill will to a department head is immaterial; the sincerity of Professor K's petition is dispositive.

Subsequently, Professor K reports to the Department of Education that the Political Science Department has disregarded institutional review standards for survey research involving human subjects. Professor K has no reason to believe that such a wrong occurred but made the complaint in the hope that an ensuing scandal will prompt a disliked department head to

step down. Professor K's communication is not protected by academic freedom, because the communication was made for no legitimate purpose. The communication is not protected as a First Amendment petition because the complaint was false and a mere sham. Professor K may not be condemned for his personal animosity for the department head, but his groundless complaint to public authorities may support the imposition of adverse employment action.

(11) Exercise of Public Right. Professor L in the German Department of a public university files a request under the state freedom of information act (FOIA) to obtain public records revealing the expenditures of the department. The department previously denied access to these records to Professor L on grounds that she had no authority over or responsibility for the financial disposition of the department. The FOIA does not condition access on the purpose of the request or identity of the requester. Professor L's FOIA request is protected by academic freedom, because Professor L's supervision of departmental expenditures is closely related to service through faculty governance. Moreover, Professor L's request is protected because the exercise of a statutory or constitutional right cannot be cause for adverse employment action.

In an unrelated matter, Professor L, serving on the university's readmissions committee, lawfully comes into possession of a former student's private medical history, which includes records of medical treatment for depression and related violent expressions. Over Professor L's vote, the readmissions committee readmits the applicant as a freshman. Believing that the readmissions committee jeopardizes the safety of the community, Professor L releases an unredacted copy of the applicant's record to the news media. Professor L's release to the media is not protected by academic freedom, and Professor L may suffer adverse employment action for the disclosure. Though ordinarily the First Amendment prohibits prior restraint of the subsequent dissemination of truthful information lawfully obtained, Professor L may be, as a university employee, constitutionally restrained by the Family Educational Rights and Privacy Act.

(12) Organization of Conference. Professor M in the History Department organizes a conference of academic professionals on the subject of teaching evolutionary biology. The History Department asks Professor M, an avowed atheist, to cancel the conference for fear that protests organized by a student organization espousing creationist theology will be disruptive to the campus. Professor M refuses to cancel the conference. Professor M's decision to go forward with the conference is protected by academic freedom, because Professor M's conference activity is closely related to teaching, research, and service. The History Department may not upon mere fear of disruption override Professor M's decision, and the History Department must endeavor to thwart unlawful disruptive conduct before resorting to censorship of academic activity.

The conference proceeds amid vigorous protests. As a controversial keynote speaker, invited by Professor M, is about to take the lectern, university security receives a credible threat that a bomb has been planted inside the auditorium where the conference is being held. With the approval of university and departmental administrations, security evacuates the facility. The speaker, who must depart on a tight schedule, cannot appear. No violation of Professor M's academic freedom has occurred. The university acted neutrally with regard to viewpoint and only upon circumstances demonstrating an imminent threat of substantial campus disruption that could not be averted by less restrictive action.